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NO. 90-749

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, GEORGE S. MICKELSON, GOVERNOR, MARK BARNETT, ATTORNEY GENERAL, JIM JONES, SUPERINTENDENT, HIGHWAY PATROL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

ROSEBUD SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, STANDING ROCK SIOUX TRIBE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF STATE OF SOUTH DAKOTA

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INTRODUCTION

This brief constitutes the response of the State of South Dakota to the Opposition to Petition for Writ of Certiorari filed by the Respondent Indian Tribes (Opposition) and to the Brief for the United States as Amicus Curiae (Amicus Curiae).

At issue is whether the State successfully assumed Public Law 280 jurisdiction over Indians on highways through Indian country in South Dakota in 1961 and whether it retains that jurisdiction to this day. The highways involved include South Dakota Highways 20, 34, 44, 63 and 85 and U.S. Highways 12, 18, and 212. The highways at stake, especially the federal and state highways, are vital arteries of intra- and interstate commerce.

Recognition of State jurisdiction over tribal members on reservation highways would allow the State to deal with the appalling fatality rate countenanced by the tribes and the United States on roads through the reservations. Statistics presented to the courts below indicate that the ten year highway fatality average for reservation counties is far in excess of that of the rest of the State. South Dakota experienced a

statewide ten year fatality rate of 2.98 per 100 million miles travelled in 1977-86. In contrast, Dewey and Ziebach Counties on the Cheyenne River Reservation had fatality rates of 8.02 and 7.02, or approximately two and one-half times the State average. Todd County, on the Rosebud Reservation, had a ten year fatality rate of 10.25, or in excess of three times the State average. Shannon County, on the Pine Ridge Reservation, had a ten year fatality rate of 17.01, or approximately five and one-half times the State average. (See Affidavit of Pat Winters.) The federal resistance to this Petition for Certiorari is not justified by any concern for the health and safety of reservation residents when it is considered that state law enforcement could bring reservation fatality rates more in line with non-reservation rates.

The position of the United States in this case is likewise problematic when it is considered that it is contrary to that taken before the Eighth Circuit Court of Appeals in Woehl v. United States, No. 87-5386 S.D. (Brief of the United States filed December 21, 1988). In Woehl, the United States took the view that there was "no doubt" that South Dakota had successfully assumed jurisdiction over Indians on highways to Indian country in 1961, and had retained that jurisdiction ever since. See id. at 22. The case was settled but the United States either does not or cannot reconcile its two positions.

The position of the United States is, finally, difficult to understand given the concessions of the United States as to the merits of the State's argument. See Brief of the United States as Amicus Curiae, State of

South Dakota v. Rosebud Sioux Tribe, No. 90-749, pp. 9, 10-11, 12.

In any event, the State submits that it did successfully assume partial Public Law 280 jurisdiction over highways in 1961, that that assumption of jurisdiction was consistent with Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979), and that the plain language of the savings clause in the 1968 Indian Civil Rights Act, 25 U.S.C § 1323(b) prevents any argument that the State lost jurisdiction through that Act.

NEITHER THE RESPONDENT NOR THE UNITED STATES HAS STATED SUFFICIENT REASONS FOR DENYING THE WRIT.

A. The Proper Standard For Judging Whether South Dakota's Assumption of Jurisdiction Was Valid Has Been Ignored Below.

This Court in Yakima, 439 U.S. at 497, unambiguously set out the standard for

argument here than in any reservation disestablishment or diminishment case and the argument deserves to be rejected.

E. The Position of the United States is Inconsistent.

The United States as Amicus Curiae neglects to point out that the position taken in the brief before this Court is contrary to the previous position taken by the United States in the United States Court of Appeals for the Eighth Circuit. In Woehl v. United States, No 87-5386 S.D. (Brief of United States, filed December 21, 1988), the United States argued that South Dakota had assumed jurisdiction over roads on the reservation, that its assumption of jurisdiction was immediately effective, and that it was "unaffected by subsequent South Dakota legislation, by the 1964 referendum, and by the Civil Rights Acts of 1968. It has never been removed by Congress." Id. at 21. The

United States said further that Yakima and Onihan[2] "left no doubt that South Dakota's limited assumption of jurisdiction over criminal and civil matters arising on highways on Indian reservations was valid in 1961 and has remained so ever since." Id. at 21-22.[3]

The unexplained inconsistency of the position of the United States in Woehl and in

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[2]In State v. Onihan, 427 N.W.2d 865 (S.D. 1988), the South Dakota Supreme Court determined that the State had successfully assumed jurisdiction in 1961 and had retained it to the present. After the Eighth Circuit's decision in Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990), the state court, virtually without any independent analysis, reversed itself. State v. Spotted Horse, No. 16644 slip op. (S.D. Oct. 4, 1990), petition for cert. pending, No. 90-1003.

[3]This action as settled before argument and no circuit court opinion was issued in Woehl.

p. 794. The Tribe also indicated that approximately "one-third of all arrests are for traffic related offenses." Id. Thus, the RST law enforcement budget is in the range of $150,000-$200,000 for traffic offenses by its own admission.

Clearly, income will run far below the costs of exercising jurisdiction. South Dakota itself estimated a total increase in costs from additional state troopers in Todd County alone of $140,000 per year. Additional costs to the state will include that of court appointed lawyers, the cost of jailing or imprisoning offenders, the costs of probation officers and similar costs.

Amicus Curiae also argues that South Dakota's assumption of jurisdiction is less compatible with Public Law 280 than was the Washington's because South Dakota did not assume burdensome types of jurisdiction

"such as domestic relations and juvenile delinquency." Amicus Curiae, p. 10.

Congress has made clear that matters involving children are at the heart of tribal culture. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901-1963. South Dakota suggests that the United States' insistence upon an intrusive assumption of jurisdiction in the area of domestic relations is inconsistent with Yakima, 439 U.S. at 497, which endorsed "responsible and sensitive" assumptions of jurisdiction and with § 7 of Public Law 280 which comprehensively permitted partial assumptions of jurisdictions "in such manner as the people of the state shall" provide.

C. The Indian Civil Rights Act of 1968 Expressly Preserved any "Cession" of Jurisdiction Previously Made and Thus Cannot be Read to Deprive South Dakota of Jurisdiction Taken in 1961.

Neither the Tribes nor the United States deals satisfactorily with section 404(b) of the Indian Civil Right Act of 1968, 25 U.S.C.

State Assistant Attorney General Andre, three years before the passage of the 1968 Indian Civil Rights Act, concentrated his comments on the attempt by South Dakota in 1963 to assume total jurisdiction and did not spend much time analyzing the 1961 assumption of jurisdiction at issue here. As to the 1961 legislation, Andre in effect stated that the South Dakota Supreme Court declared the 1961 bill "invalid" because "piecemeal jurisdiction" could not be taken consistently with congressional intent. See Hearings on S. 961-S. 968 Before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 89th Cong., 1st Sess. 118. This Court, however, was ultimately to find that in Yakima "piecemeal jurisdiction" could be taken consistently with congressional intent. In essence, the United States urges this Court to find that a state assistant attorney general's erroneous interpretation of Public

Law 280 should control over this Court's later holding in Yakima.

Senator McGovern's statement is of little assistance because it does not address at all the 1961 assumption of jurisdiction at issue here but only the attempt in 1963 to assume total jurisdiction. See id. at 15-16.

Finally, it is distressing that the argument made in this case is parallel to the failed argument of the United States in Yakima. The United States argued in Yakima that certain statements in committee dictated the result that the State of Washington would be compelled to amend its constitution before assuming under Public Law 280. See Brief of United States as Amicus Curiae, Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, No. 77-388, reprinted at South Dakota District Court Appendix Vol. 2, p. 493 et seq. In particular, the United States in the Yakima litigation pointed to the

statement of Congressman Westland of Washington which expressly referred to the situation in his state:

> I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this jurisdiction as far as criminal and civil was concerned but they do have a constitution there that requires this amendment in order that they can get at it.

Id. at 529.

The Representative from Washington thus announced that his home state would have to amend its constitution before assuming jurisdiction. Senator Case of South Dakota, the apparent sponsor of the bill in the Senate, agreed, according to the Brief of the United States. Id., p. 531.

This Court found, in the face of these arguments, that

> while some committee members apparently thought that § 6 states, as a matter of state law, would have to amend their constitutions in order to remove the disclaimers

> found there, there is no indication that the committee intended to impose any such requirement.

Washington v. Yakima Indian Nation, 439 U.S. at 492-493. The misapprehension of certain members of Congress of the state of the law did not persuade this Court to adopt that misapprehension. The same should be true here. See also Yakima, 439 U.S. at 493 n.40.[1]

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[1]Likewise, the United States in Yakima attempted to rely upon misapprehensions regarding whether Public Law 280 as originally enacted allowed piecemeal jurisdiction. It cited, for example, the statement of Congressman Aspinall, the Chairman on the Committee on Interior and Insular Affairs, to the effect that "authorization for partial jurisdiction was a change in the law." Brief of the United States, South Dakota District Court Appendix Vol. II, p. 583. See also, id. at 582. (Statement of Sen. Ervin). Likewise, the holding of the South Dakota Supreme Court in Hankins, rejecting piecemeal jurisdiction was relied upon by the United States. Id. at 559, 579, 584 and 588. Nonetheless, this Court did not adopt the erroneous 1964-68

(Footnote Continued)

D. Practical Considerations Strongly Suggest This Case Warrants Further Review.

The most critical practical consideration in determining whether this case merits certiorari is one completely ignored by Amicus Curiae and one treated with contempt by Respondents. See Opposition p. 9, n.26. This practical effect is the continuation of the extremely high fatality rate on highways on reservations in South Dakota. South Dakota developed and submitted the statistics to the courts below which show ten year fatality rates of from two and one-half to five times the State average on the Indian reservations studied. These statistics demonstrate that the tribes and federal government have failed to protect both

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(Footnote Continued)
view that piecemeal jurisdiction was not allowable under the Act.

Indians and non-Indians who travel the highway in question. In this light, it seems that the United States should urge this Court to accept the state's claims and thus provide protection for Indians on reservation roads.

Moreover, it might be noted that the statistics are not surprising, for no tribe has made any claim to the courts in this matter of any actual conviction rates or has demonstrated, for example, that any person was ever jailed for a driving while intoxicated offense.

Second, from a practical perspective, and despite the protestations of the United States, the Eighth Circuit's opinion does undermine the piecemeal jurisdiction taken in Arizona, Montana and Iowa.

Finally, the United States at the last moment raises the spectre, without citation of authority, of voiding past federal criminal convictions. There is no more of an

determining whether a state has successfully assumed jurisdiction under Public Law 280:

> The drafters were primarily concerned with establishing a general transfer scheme that would facilitate, not impede, future action by other states willing to accept jurisdiction.

The essence of this position of both the Respondents and Amicus Curiae is to the contrary--that Congress intended to set up a system which would "impede" not "facilitate" action by other states willing to accept jurisdiction.

B. Legislation Enacted by South Dakota in 1961 Complied With Public Law 280 As Construed By This Court in Yakima.

Both the Respondents and the United States contend that South Dakota's 1961 legislation did not comply with Public Law 280. The Respondents' argument is simply an ipse dixit. Opposition, pp. 9-10. Amicus Curiae argues that the South Dakota statute is "less compatible with Public Law 280 than the

Washington statute was." Amicus Curiae p. 10. Amicus Curiae contends that this is so because South Dakota assumed only highway jurisdiction, stating that it "might be thought to finance itself. . . ." Id. It is clear, however, the taking of highway jurisdiction on a poverty stricken reservation will not finance itself. According to one of the tribes engaged in this litigation, the Rosebud Sioux Tribe, the money actually collected for violation of tribal traffic laws in Todd County in 1985 and 1986 was approximately $27,000 and $48,000. See Rosebud Sioux Tribe Answers to Interrogatories, South Dakota District Court Appendix III, p. 792, 793. The total budget for law enforcement for the Police Department of that Tribe "for 1984 was $509,632, 1985 was $752,000 and 1986 was $665,600." RST Answers to Interrogatories, South Dakota District Court Appendix III,

1323(b) which expressly provides that the 1968 Act shall not "affect any cession of jurisdiction made pursuant to said section prior to its repeal."

This unambiguous language requires that if a "cession" had been made prior to the Act it was preserved. In South Dakota's case the cession was consummated when the state legislature adopted SL 1961, ch. 164, effective on July 1, 1961. The plain language of the statute requires a finding that the 1968 legislation could not affect the prior session of jurisdiction.

As this Court recently stated:

> The purpose of a statute includes not only what it seeks to change, but what it resolves to leave alone. (Citation omitted.) The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President.

West Virginia University Hospital, Inc. v. Casey, 59 U.S.L.W. 4180, 4184 (1991).

Here, the plain statutory text "resolves" to leave alone the previously made "cession" of jurisdiction to South Dakota. To avoid application of the plain meaning of the statute, the United States, and the Respondents, contrary to Casey, have engaged in a unimpressive search for any snippet of legislative history that would allow a finding contrary to that language. The two portions of this legislative history cited (but not quoted) by the United States include a statement of an assistant attorney general of South Dakota in 1965, Amicus Curiae, p. 13 n.4, and a 1965 statement of Senator McGovern. Both of the citations are to statements made to a congressional committee three years before the passage of the bill; neither was made part of any official report. See generally Pierce v. Underwood, 108 S.Ct. 2541, 2550- 2551 (1988). Neither statement can be given weight in view of its content.

this case undermines the present argument of the United States.

CONCLUSION

In view of the high fatality rate on highways through reservations in South Dakota, including several state and federal highways and in view of the inconsistency of the decision of the Court of Appeals with decisions of this Court, South Dakota respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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